IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA650/2022
[2023] NZCA 563

BETWEEN	JOSEPH WHEELER Appellant
AND	THE KING Respondent

Hearing: 26 July 2023 (further submissions received 18 September 2023)

Court: Mallon, Moore and Palmer JJ

Counsel: D A Ewen and E T Blincoe for Appellant
M J Lillico and Z Zhang for Respondent

Judgment: 15 November 2023 at 11 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] The appellant, Joseph Wheeler, murdered Richard Wallace on the evening of 19 July 2021. Mr Wheeler stabbed Mr Wallace in what he described as a "fit of rage" during a confrontation over a minor drug debt at Mr Wallace's home. Mr Wheeler fled the scene, but later turned himself in, confessed and subsequently pleaded guilty. He

was sentenced by Ellis J in the High Court to life imprisonment with a minimum period of imprisonment (MPI) of 10 years.[1]

[2] Mr Wheeler appeals his sentence. He seeks a determinate sentence rather than a life sentence. He says a life sentence is manifestly unjust because of the requirement with such a sentence to impose an MPI of not less than 10 years.[2] He says that, but for this minimum requirement, his personal mitigating circumstances would have warranted an MPI of no more than six to eight years. He seeks that his life sentence be quashed and replaced with a finite sentence of 14 to 16 years' imprisonment with an MPI of six to eight years.

The offending

[3] Mr Wallace was 70 years old and lived by himself. On occasion, Mr Wheeler supplied him with cannabis. Mr Wheeler had also loaned Mr Wallace some money for alcohol. From the loan and the cannabis, Mr Wallace owed Mr Wheeler about $80 to $100.

[4] Mr Wheeler made several attempts to obtain payment of the debt. On 12 and 13 July 2021 Mr Wheeler contacted Mr Wallace by text and phone, and threatened him. Mr Wallace told Mr Wheeler he had made a mistake about when he would receive his pension and could not pay Mr Wheeler straight away.

[5] During the day of 19 July 2021 Mr Wheeler went to Wellington Hospital, seeking medication for mental health issues he was experiencing. Mr Wheeler became frustrated at how long the hospital was taking to get him medication. He arranged for Mr Wallace to bring him the money at the hospital. Mr Wallace, however, cancelled that arrangement, seeking to put it off until the next day.

[6] At about 9.50 pm on 19 July 2021 Mr Wheeler travelled in a taxi with an associate to Mr Wallace's home in Strathmore. He intended to assault Mr Wallace. He was frustrated because Mr Wallace had not paid him. When Mr Wheeler arrived at Mr Wallace's house, Mr Wallace paid for the taxi and gave Mr Wheeler a small

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1 *R v Wheeler* [2022] NZHC 2151 [Sentencing notes].
2 Sentencing Act 2002, s 103(2).

amount of cash. Mr Wheeler entered Mr Wallace's home and rolled himself a cigarette. Mr Wallace was sitting on his couch.

[7] Mr Wallace explained to Mr Wheeler that he did not have the money to pay the debt with him and that he would have to get the rest of the money from an ATM. Mr Wheeler became enraged. He approached Mr Wallace, kicking over a bottle of wine on the ground next to Mr Wallace. Mr Wheeler grabbed a steel knife that was stuck into the arm of the couch and swung at Mr Wallace. He stabbed Mr Wallace three times, in what he later described as a "fit of rage".

[8] Mr Wheeler immediately left the address with his associate, leaving Mr Wallace on his back on the floor in a pool of blood making "gurgling noises". Neither Mr Wheeler nor his associate made any attempt to call for medical assistance. Mr Wallace died at the scene from loss of blood. The fatal wound had penetrated his lung.

[9] Mr Wheeler turned himself in to the police two weeks later. He pleaded guilty to the charge of murder following the preparation of psychiatric reports indicating that he was fit to do so and had no basis for a defence of insanity. Mr Wheeler expressed remorse to the police. He admitted to the facts described and explained he had been angry about not receiving the medical health assistance he believed he needed and at Mr Wallace for not paying him.

The offender

[10] Mr Wheeler was 52 at the time of the offending. He was living in his car in Wellington.

[11] In interviews with health professionals, he reported being rejected by his biological mother and, after various foster placements, was adopted by a Pākehā family when he was young. He understood from his adoptive family that he was rejected because of the circumstances of his birth (which are not necessary to outline here) and that his mother was an alcoholic. He never saw his mother again. He reported being physically abused by his adoptive father but that he had a close relationship with his adoptive mother until she died when he was 15.

[12] Mr Wheeler reported having behavioural difficulties as a child. When he was nine years old, he was placed in a "boys' home" after assaulting his adoptive father with a tomahawk axe. Over the following years, he lived in several "boys homes" where he was bullied and physically abused. He struggled at school and did not learn to read or write. He was hyperactive and violent towards other students. He left school when he was 15. He then lived on the "on the streets" with another foster child.

[13] Since then, Mr Wheeler has spent much of his life homeless or in prison. He has multiple convictions, largely of a relatively low-level nature, beginning with wilful damage when he was 15 years old. His most serious offending, prior to the present offending, involved convictions for wounding with intent to cause grievous bodily harm for which he received a sentence of imprisonment of six years and six months. He has several convictions for assault.

[14] Mr Wheeler has a lengthy history of mental health issues. He presented to mental health services when he was 16 years old, reporting that he was hearing voices and suicidal. He was admitted to impatient care in 1992 at aged 23 for detoxication. He was discharged after five days and referred to alcohol and drug services. He was readmitted the following year for three days, and again referred to alcohol and drug services.

[15] He was admitted to hospital on occasions each year between 1997 and 2000. These appear to have been brief stays. On at least some of these occasions he reported hearing voices and having thoughts of self-harm. On one occasion in 1998 he described experiencing auditory hallucinations in the form of the devil telling him to take revenge on an ex-partner and that he was concerned he was a danger to the public. On another occasion he was reportedly aggressive and had thrown chairs around the waiting room of the hospital emergency department. He was diagnosed with poly-substance abuse, adjustment disorder with depressed mood and antisocial personality disorder. He was treated with an antipsychotic medication.

[16] Between 2000 and 2001 he had contact with community psychiatrist services. He would often demand medication and act in an intimidating manner to medical staff. The primary diagnosis was a personality disorder and substance abuse disorder with

fleeting periods of adjustment disorder and substance abuse psychotic disorder. It was suggested that he was abusing prescription sedative medication and this was not assisting the situation.

[17] Between 2001 and 2006 Mr Wheeler received mental health treatment in prison. After this, he was reported to have "settled dramatically in his mood, was no longer experiencing auditory hallucinations or other symptoms of depression". From 2013 he was referred to Te Whare Marie Specialist Māori Mental Health Service and appears to have engaged with that service for a number of years.

[18] He had inpatient care for a few days in 2017. He presented to the emergency department in 2020 and was referred to his general practitioner. He was trespassed from his general practitioner's practice in 2021 because of his threatening behaviour to the reception staff. At some point in 2021, Mr Wheeler overdosed on a polysubstance and presented to the emergency department. He was said to be aggressive and was asked to leave and see the Community Mental Health Team. He reported feeling stressed and angry. At some point that year, a plan was made for him to find a new doctor and to apply for social housing. He was on medication.

[19] As noted, on the day of the offending Mr Wheeler presented at the emergency department of Wellington Hospital seeking medication. He became angry at the time it was taking for him to receive it, and reportedly left before he received all of it.

[20] Following the offending, Dr Justin Barry-Walsh, a psychiatrist, was instructed by the Court to address whether Mr Wheeler was fit to stand trial. He concluded that Mr Wheeler was fit to stand trial. He recommended an assessment by a communications assistant. He considered Mr Wheeler to have a high level of remorse for his actions. His opinion on Mr Wheeler's mental health difficulties was as follows:

> I find no evidence of a clear cut mental illness in Mr Wheeler. I am of the view that his problems are primarily in the realm of personality functioning with disturbance in his personality characterised by prominent problems regulating his mood with associated difficulties managing anger, anxiety and a pattern of recurrent offending suggestive of a willingness to breach social sanctions in order to achieve gains. As noted there is a possible contribution from putative cognitive difficulties.

[21] Chriztine Gemmell, a clinical psychologist, was instructed to undertake a cognitive assessment of Mr Wheeler. She concluded that Mr Wheeler did not meet the criteria for an intellectual disability and his cognitive functioning, while "low", did not raise any concerns about his ability to participate in the sentencing process. She considered that Mr Wheeler's hearing difficulties were likely to have influenced his cognitive performance in her testing. She also noted that his "low functioning" was likely indicative of his poor school performance, early trauma and long-standing drug abuse history. There were no concerns that would lead to issues in relation to the sentence imposed on Mr Wheeler. Like Dr Barry-Walsh, she considered that Mr Wheeler appeared to be remorseful regarding his offending.

Sentencing

[22] Mr Wheeler sought a sentencing indication. Ellis J indicated a sentence of life imprisonment with an MPI of 11 years before discounts.[3] In giving that indication, the Judge said that a guilty plea discount alone would take the end MPI down to 10 years.[4] The Judge acknowledged the submission for Mr Wheeler that, due to his mental health issues, a finite sentence might be available.[5] While not entirely ruling this out, the Judge indicated it did not seem a possible outcome on the information before her.[6]

[23] At sentencing, the key issue was whether a sentence of life imprisonment would be manifestly unjust.[7] For Mr Wheeler, it was argued that, because an MPI of 10 years would be manifestly unjust (that period being the minimum available for a life sentence), a life imprisonment sentence would be manifestly unjust. The Judge rejected this submission saying:[8]

> [29] The authorities by which I am bound are clear that sentences less than life imprisonment for murder are "likely to be reached in exceptional cases only". As the law currently stands both the circumstances of the offence *and* of the offender must be taken into account when making that assessment.

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3 *R v Wheeler* HC Wellington CRI-2021-085-1706, 13 April 2022 at [5].
4 At [4].
5 At [6].
6 At [6].
7 Sentencing notes, above n 1.
8 Footnote omitted.

> [30] Putting the question of the MPI to one side for a moment, there is simply no way that the circumstances of Mr Wallace's murder come close to that exceptionality threshold. Mr Wallace was stabbed in his own home over the smallest of debts and then left dying on the floor. And while I acknowledge that your personal circumstances and the wider cultural context are in many ways tragic they, too, are regrettably far from exceptional, in terms of the threshold we are talking about today.

[24] The Judge went on to say that the mandatory 10-year MPI and a life sentence went hand in hand.[9] That is, if a life sentence was not manifestly unjust then nor was the mandatory 10-year MPI.[10] This meant that the proper inquiry was on the justness of the life sentence.[11] The Judge also rejected a submission that the mandatory MPI was only concerned with punishment, noting that, relevantly in Mr Wheeler's case, the purposes included community protection.[12]

[25] The Judge accepted that, if a finite sentence were appropriate, Mr Wheeler's personal circumstances would warrant a greater discount than they would on a sentence of life imprisonment.[13] She considered, however, that on a sentence of life imprisonment, a 10-year MPI was not manifestly excessive or disproportionate in Mr Wheeler's circumstances, even stepping back and looking at the MPI separately.[14]

Supreme Court consideration of *Van Hemert*

[26] Mr Wheeler sought leave to appeal directly to the Supreme Court on the question of whether the 10-year MPI rendered his life sentence manifestly unjust. He did so because the Supreme Court had granted leave to appeal a life imprisonment sentence in *Van Hemert v R* and Mr Wheeler wished to have his appeal heard at the same time.[15]

[27] *Van Hemert* was a case where the High Court, following a sentencing indication, had imposed a finite sentence on a charge of murder where the offender

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9 At [31].
10 At [31].
11 At [31].
12 At [32].
13 At [33].
14 At [34].
15 *Van Hemert v R* [2023] NZSC 116 [*Van Hemert* (SC)].

had significant mental health issues.[16] That was overturned in the Court of Appeal which said:[17]

> [36] The presumption on s 102(1) of the Sentencing Act [2002] requires a compelling case to be established before an offender can be considered eligible for a sentence less than life imprisonment in cases of murder. This Court has previously explained that sentences less than life imprisonment for murder are "likely to be reached in exceptional cases only".
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> …
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> [37] Before the presumption in s 102(1) is displaced, the Court must be satisfied the circumstances of both the murder and the offender are such that a sentence of life imprisonment would be "manifestly unjust". Thus, even where the circumstances of the offender might weigh in favour of a finite sentence, the presumption of life imprisonment prevails where the circumstances of the offending do not also displace the presumption and vice versa.

[28] This was the approach Ellis J followed in sentencing Mr Wheeler. The Judge noted that this was the current position and that the Supreme Court had granted leave to an appeal on this issue in *Van Hemert*.[18] The Supreme Court declined Mr Wheeler's application for leave to appeal directly to that Court.[19] It considered there were not exceptional circumstances that justified a direct appeal to the Supreme Court where that Court would not have had the benefit of this Court's views on Mr Wheeler's case.[20] Further, the proposed argument could be made in Mr Van Hemert's appeal in any event.[21]

[29] In the period following the hearing in this Court on Mr Wheeler's appeal, the Supreme Court delivered its decision in *Van Hemert*.[22] It considered this Court had erred in saying that both the offending and the offender's circumstances must compel a conclusion of manifest injustice before the presumption of life imprisonment is displaced.[23] Rather, the two elements are to be weighed together in assessing whether

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16 *R v Van Hemert* [2020] NZHC 3203.

17 *R v Van Hemert* [2021] NZCA 261 (footnotes omitted). Sentencing was remitted to the High Court to provide Mr Van Hemert with the opportunity to withdraw his guilty plea (given it had been entered after a sentencing indication). He was subsequently sentenced in the High Court to life imprisonment with an MPI of 11 years and six months: *R v Van Hemert* [2021] NZHC 2877.

18 Sentencing notes, above n 1, at [29] and [29], n 4.

19 *Wheeler v R* [2022] NZSC 129.

20 At [4].

21 At [4].

22 *Van Hemert* (SC), above n 15.

23 At [56] per Glazebrook, O'Regan, Ellen France, and Kós JJ and at [111] per Williams J dissenting.

a life sentence would be manifestly unjust.[24] Manifestly meant that the injustice must be clear.[25] Contributory mental impairment was a "highly relevant circumstance" in whether a sentence less than life might be imposed, but the court must consider and weigh all relevant purposes and principles.[26] That included the interests of the victim and community protection.[27]

[30] On the facts before it, the majority accepted that Mr Van Hemert lacked an inherent propensity for violence and the offending would not have occurred but for the onset of an uncontrollable psychotic episode.[28] While these considerations pointed in favour of finding that life imprisonment was manifestly unjust, public safety considerations pointed the other way.[29] The Court considered that Mr Van Hemert was prone to relapse, well aware of what he had done and yet remained "troublingly" unremorseful, lacking both social support and self-insight.[30] In these circumstances it concluded that:

> [95] … [I]t is not clearly unjust that extended parole eligibility and release conditions, and potential for recall, all measures calculated to provide greater assurance of public safety, apply to Mr Van Hemert.

[31] The appeal against the imposition of a life sentence was therefore unsuccessful. The majority allowed the appeal against sentence only to the extent that the MPI was reduced from 11 years and six months to 10 years.[31]

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24 At [57] and [62] per Glazebrook, O'Regan, Ellen France, and Kós JJ and at [111] per Williams J dissenting.

25 At [62] and [78] per Glazebrook, O'Regan, Ellen France, and Kós JJ citing *R v Rapira* [2003] 3 NZLR 794 (CA) at [121]. Williams J, who dissented, at [112] said manifest injustice was "relatively straightforward—the court must not impose the law's automatic and most severe punishment for the law's most serious crime if, in light of the circumstances of the offence and the offender, that sentence would be plainly unjust".

26 At [80] per Glazebrook, O'Regan, Ellen France, and Kós JJ.

27 At [80]–[81] per Glazebrook, O'Regan, Ellen France, and Kós JJ.

28 At [82] per Glazebrook, O'Regan, Ellen France, and Kós JJ.

29 At [82]–[83] per Glazebrook, O'Regan, Ellen France, and Kós JJ.

30 At [95] per Glazebrook, O'Regan, Ellen France, and Kós JJ.

31 At [98] per Glazebrook, O'Regan, Ellen France, and Kós JJ. Williams J, in dissent, would have directed further reports to enable the Court to properly assess Mr Van Hemert's future risk and possible measures for managing the risk: at [146]–[147]. The Judge considered this was the proper approach under the New Zealand Bill of Rights Act 1990. The Judge considered that Mr Van Hemert's right to be free from discrimination (in respect of his psychiatric illness) was engaged and his sentence should not have been longer than what was proportionate to his culpability and (if risk exceeded that culpability) that which was demonstrably justifiable for risk management purposes. If not, the sentence would not be demonstrably justified or, in other words, manifestly unjust.

This appeal

[32] On appeal, Mr Wheeler contends that the Judge erred in finding both the circumstances of the offence and the circumstances of the offender had to be exceptional before the manifest injustice test could be met. He submits that, while both are taken into account, there is no requirement that they both be manifestly unjust. We agree. The Judge relied on her understanding of the law at the time for her approach (recognising the issue was before the Supreme Court). As we have discussed above, the Supreme Court found that approach to be in error.[32]

[33] Mr Wheeler further contends that the Judge erred in finding that the source of manifest injustice must be the life sentence itself, rather than the 10-year MPI. He submits that the correct approach to an assessment of manifest injustice involves comparing the 10-year MPI with the MPI that would be set but for the 10-year minimum. In failing to take this approach, Mr Wheeler submits that the Judge failed to give effect to his rights under the New Zealand Bill of Rights Act 1990 — namely s 9 (the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment) and s 22 (the right not to be arbitrarily arrested or detained).

[34] This was a submission made to the Supreme Court in *Van Hemert* by Te Matakahi | Defence Lawyers Association of New Zealand, which was granted leave to intervene in that case. It put the submission in the following way:[33]

> The differential between the result of the justifiable MPI and the ten-year minimum under s 103 will thus inform the manifest injustice test in s 102. Any significant difference between the two will represent an arbitrary detention: the offender will have completed the period of imprisonment necessary to give effect to the MPI criteria in s 103 and from that point on should be allowed to demonstrate he or she is no longer a risk to community safety. That would include access to courses necessary to minimise risk.

[35] This submission was not directly addressed by the majority in *Van Hemert*.[34] The majority did, however, consider the converse of this submission. That is, the

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32 Above at [29].

33 Footnote omitted.

34 *Van Hemert* (SC), above n 15. At [127]–[134], Williams J considered an analytical framework for how a different right — the right to freedom from discrimination in s 19 of the New Zealand Bill of Rights Act — might give rise to a disproportionate sentence.

majority considered that the fact that parole eligibility would arise more than three years earlier under a finite sentence than under a life sentence, as well as the fact that early release would be without extended release conditions and the right of recall, was relevant to public safety considerations that rendered a life sentence not manifestly unjustifiable.[35] The majority also quoted the Minister of Justice's speech to the House, when introducing the Sentencing and Parole Reform Bill that led to the manifest unjust exception to life imprisonment for murder,[36] which said:[37]

> A more flexible regime is applied to murder, requiring the court to take into account mitigating and aggravating factors. The bill retains a strong presumption in favour of life imprisonment for murder. However, in a small number of cases, such as those involving mercy killing, or where there is evidence of prolonged and severe abuse, a mandatory life sentence is not appropriate. Under this legislation, the court will be able to consider a lesser sentence. *We can all think of cases where there were mitigating factors*, perhaps the Janine Albury-Thomson case, which might have properly been considered murder—intentional killing—*but for which a mandatory sentence of at least 10 years imprisonment would have been inappropriate*. In the past, the jury has compensated for that inflexibility by finding a different verdict; in that case, manslaughter. This [reform] enables the jury to make an honest verdict, but for the sentence to be appropriate in all the circumstances

[36] We accept a 10-year MPI that must, as a minimum, be imposed on a sentence of life imprisonment may be relevant to the overall assessment of whether a sentence of life imprisonment is manifestly unjust in a particular case. However, we do not accept that Mr Wheeler's case is one where a sentence of life imprisonment is manifestly unjust, taking into account the circumstances of his offending and his personal circumstances, for the following reasons.[38]

[37] First, the circumstances of the offending point in favour of life imprisonment. Mr Wheeler stabbed Mr Wallace in his own home over the smallest of debts. He did so in a self-described "fit of rage", with force sufficient to penetrate Mr Wheeler's lung, and then left him lying on the floor in a pool of blood making "gurgling noises" without any attempt to call for medical assistance. While Mr Wheeler's very disadvantaged background and history of mental health issues are compelling, this

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35 At [74]–[76], [89] and [93] per Glazebrook, O'Regan, Ellen France, and Kós JJ.
36 Sentencing and Parole Reform Bill 2001 (148-1).
37 *Van Hemert* (SC), above n 15, at [32] per Glazebrook, O'Regan, Ellen France, and Kós JJ quoting (14 August 2001) 594 NZPD 10910–10911 (emphasis added).
38 Sentencing Act, s 102(1).

violent, and essentially unprovoked, attack brings the need for community protection to the fore.[39]

[38] Secondly, Mr Wheeler's history indicates a long-standing propensity for aggression. He has a long history of relatively low level convictions for violence, as well as the more serious violence that led to his sentence of six years and six months' imprisonment. As the Crown submits, his anger and violence has manifested across a variety of settings: the abuse of health clinic receptionists; aggression towards emergency department staff; assault on his ex-partner; assault of police and Corrections officers; eviction from his flat because of yelling or screaming out in anger; and assault of two members of the public who Mr Wheeler perceived to have given him threatening stares. This propensity, alongside the serious escalation in violence that the offending represents, indicates a public safety risk that requires careful management.

[39] Thirdly, the offending did not arise from a one-off psychotic event. Mr Wheeler's personality and substance abuse disorders, while contributing to the offending, are long-standing and persistent. While Mr Wheeler has frequently sought medical help of his own initiative, the present offending demonstrates the risks he presents when his aggression is not under control. In view of the fact that the present offending occurred despite Mr Wheeler's engagement with care services available in the community and presentation to the hospital on the day of the offending, it is apparent that ongoing monitoring and oversight provided by the Parole Board under a life sentence will better and more effectively manage Mr Wheeler's public risk.

[40] Lastly, we accept that Mr Wheeler showed remorse when interviewed by Dr Barry-Walsh and Ms Gemmell. We accept that remorse evidences insight and this is beneficial to rehabilitation prospects.[40] But we cannot say that this insight provides us with sufficient confidence that Mr Wheeler will be able to take the steps necessary to manage his risk without the monitoring and oversight of that rehabilitative progress that a life sentence will bring.

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39 See *Van Hemert* (SC), above n 15, at [78], [81] and [83] per Glazebrook, O'Regan, Ellen France, and Kós JJ; and *R v O'Brien* (2003) 20 CRNZ 572 (CA) at [36].

40 See *Van Hemert* (SC), above n 15, at [81] and [84] per Glazebrook, O'Regan, Ellen France, and Kós JJ.

[41] Overall, we are not satisfied that a life sentence is manifestly unjust in this case, taking into account that the MPI is 10 years. We consider it is not helpful to compare this with an MPI that would be imposed on a finite sentence because we do not consider that a finite sentence is appropriate in this case. A life sentence, that carries with it a 10-year MPI, is the sentence that appropriately reflects accountability, denunciation, deterrence and community protection aims in this case. It gives effect to Parliament's intention that a life sentence for murder is the appropriate sentence absent a clear case of injustice.[41] Absent such injustice, it cannot amount to a disproportionately severe punishment or arbitrary detention.

Leave to appeal out of time

[42] This appeal was brought out of time. The reason for the delay was that Mr Wheeler first applied for a leapfrog appeal to appeal directly to the Supreme Court. He wanted his case to be heard alongside *Van Hemert.* As noted, that application was declined. The Crown does not oppose an extension of time. We accordingly grant an extension of time.[42]

Result

[43] The application for an extension of time to appeal is granted.

[44] The appeal is dismissed.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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41 Sentencing Act, s 103.

42 The Crown submissions suggest that an extension of time has been granted. There is nothing to suggest it has and Courtney J, in a minute dated 16 March 2023, said the application for an extension of time was to be dealt with at the hearing. In any event, it is not opposed by the Crown.